Office Supreme Court U. S.
FILED
DEC 26 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 735.

CHEMICAL NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
HARTFORD DEPOSIT COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

CHARLES H. BALDWIN,
FOR DEFENDANT IN ERROR.

BARNARD & MILLER, PRINT., CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 735.

CHEMICAL NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
HARTFORD DEPOSIT COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

Brief and Argument for Defendant in Error.

MAY IT PLEASE THE COURT:

The facts in the case at bar are, in the main, correctly stated by counsel for plaintiff in error in the introduction to his brief. This was an action in assumpsit or trespass on the case to recover damages for breach of contract. The contract was a lease of premises for a term of five years. Soon after the commencement of the term, the lessee, by becoming insolvent, rendered the performance of its part of the contract impossible. It in effect abandoned the premises. The question thereupon arose, whether, the lessee being a National Bank, the lessor had any remedy under the express covenants of the lease, on account of such failure of performance. It was not a failure to pay rent for any one month, or any particular number of months, but the breach was absolute, and extended to the entire term, the lessor remaining ready, willing and able to perform its part.

The lease, among others, contained the following express covenants:

"This Indenture, made this eighteenth day of Novem-
" ber, in the year of our Lord eighteen hundred and
" ninety-two, between the Hartford Deposit Company,
" of Chicago, in the county of Cook, in the State of Illi-
" nois, party of the first part, and Chemical National
" Bank, of the city of Chicago, in the county of Cook,
" in the State of Illinois, party of the second part. * * *

"To have and to hold the premises hereby demised,
" with the rights, easements and appurtenances thereto
" belonging, unto the said party of the second part, its
" successors and assigns (such assigns being with the li-
" cense hereinafter mentioned), from the first day of
" May now next including said day, during the full term
" of five years thence next ensuing, viz: until the thir-
" tieth day of April, A. D. 1898.

"Yielding and paying therefor during the said term
" (except only in case of fire or other casualty, as herein-
" after mentioned), as follows, to wit: unto the said
" Hartford Deposit Company, its successors and assigns,
" the sum of sixty-two thousand five hundred dollars
" ($62,500), twenty-five hundred dollars ($2,500) at
" the execution and delivery of this lease, and the re-
" mainder to be payable monthly, in advance, in equal
" monthly portions, to wit: one thousand dollars ($1,000)
" on the first day of each month in said term; the first
" monthly payment to be made on the first day of May,
" now next; and the said rent shall be paid at the office
" of the said Hartford Deposit Company, or such its

"agents in Chicago as the secretary of the Hartford Deposit Company may from time to time in writing designate. * * * .

"And the said lessee, for itself, its successors and assigns, hereby covenants and agrees with the said Hartford Deposit Company, its successors and assigns, that the said lessee, its successors and assigns, will, during the said term or any portion thereof, and for such further time as it, or any person claiming under it, shall hold the said premises or any part thereof, pay unto it the said yearly rent, as aforesaid, except only in case of fire or other casualty, as hereinafter mentioned; * * *

"And it is further expressly understood and agreed between the said parties, that in case the said party of the second part shall abandon said premises or any part thereof, during the continuance of said term, the said party of the first part may, at its option, without notice, and either in its own name or as the agent of the said party of the second part, re-let said premises, or any part thereof, on such terms and for such rent as it may deem expedient or proper, and such re-letting shall not operate as a waiver of any right whatever which the said party of the first part would otherwise have to hold the said party of the second part responsible for the rent above reserved; and in case said premises, or any part thereof, shall be re-let as aforesaid, the said party of the first part shall collect the rent therefor from the person or persons to whom the same shall be re-let, and after paying the expenses of such re-letting and collection, apply what remains of the amount received by it on account of the rent due, or to become due, from the said party of the second part, under this lease."

number of months, but the breach was absolute, and extended to the entire term, the lessor remaining ready, willing and able to perform its part.

The lease, among others, contained the following express covenants:

"This Indenture, made this eighteenth day of November, in the year of our Lord eighteen hundred and ninety-two, between the Hartford Deposit Company, of Chicago, in the county of Cook, in the State of Illinois, party of the first part, and Chemical National Bank, of the city of Chicago, in the county of Cook, in the State of Illinois, party of the second part. * * *

"To have and to hold the premises hereby demised, with the rights, easements and appurtenances thereto belonging, unto the said party of the second part, its successors and assigns (such assigns being with the license hereinafter mentioned), from the first day of May now next including said day, during the full term of five years thence next ensuing, viz: until the thirtieth day of April, A. D. 1898.

"Yielding and paying therefor during the said term (except only in case of fire or other casualty, as hereinafter mentioned), as follows, to wit: unto the said Hartford Deposit Company, its successors and assigns, the sum of sixty-two thousand five hundred dollars ($62,500), twenty-five hundred dollars ($2,500) at the execution and delivery of this lease, and the remainder to be payable monthly, in advance, in equal monthly portions, to wit: one thousand dollars ($1,000) on the first day of each month in said term; the first monthly payment to be made on the first day of May, now next; and the said rent shall be paid at the office of the said Hartford Deposit Company, or such its

" agents in Chicago as the secretary of the Hartford De-
" posit Company may from time to time in writing des-
" ignate. * * * .

" And the said lessee, for itself, its successors and as-
" signs, hereby covenants and agrees with the said Hart-
" ford Deposit Company, its successors and assigns, that
" the said lessee, its successors and assigns, will, during
" the said term or any portion thereof, and for such further
" time as it, or any person claiming under it, shall hold
" the said premises or any part thereof, pay unto it the
" said yearly rent, as aforesaid, except only in case of
" fire or other casualty, as hereinafter mentioned; * * *

" And it is further expressly understood and agreed be-
" tween the said parties, that in case the said party of
" the second part shall abandon said premises or any
" part thereof, during the continuance of said term, the
" said party of the first part may, at its option, without
" notice, and either in its own name or as the agent of
" the said party of the second part, re-let said premises,
" or any part thereof, on such terms and for such rent
" as it may deem expedient or proper, and such re-letting
" shall not operate as a waiver of any right whatever
" which the said party of the first part would otherwise
" have to hold the said party of the second part responsi-
" ble for the rent above reserved; and in case said prem-
" ises, or any part thereof, shall be re-let as aforesaid,
" the said party of the first part shall collect the rent
" therefor from the person or persons to whom the same
" shall be re-let, and after paying the expenses of such
" re-letting and collection, apply what remains of the
" amount received by it on account of the rent due, or
" to become due, from the said party of the second part,
" under this lease."

Under the facts as they exist in this case, and in view of the express covenants above quoted, contained in the lease, it is contended on behalf of the defendant in error, that the claim for damages against the bank for violation of its contract is one which should be allowed and paid *ratably with all other claims* proven against the insolvent bank. *No preference is asked* for this claim over other claims; that would be contrary to the law. *No interest is asked on the principal* of the claim because of any delay in adjudication or payment, except such interest as may be allowed to all other creditors of the insolvent alike.

The scope of the argument to which the attention of this honorable court will be directed is then briefly this:

As a general proposition, a lessee of premises for a term of years, who during the term becomes insolvent, is not thereby discharged from his obligations incurred under the express covenants of the lease. The same is none the less true in case the lessee happens to be a corporation, so long as the corporation or its successor remains legally in existence. This lessee, the plaintiff in error, still remains legally in existence, and there is nothing in the Act under which it was created to change the general rule of law above stated. Therefore, plaintiff in error is liable for its obligations incurred under the lease.

BRIEF.

I.

A lessee, who during the term renders the performance of his part of the contract impossible, whether by his insolvency or otherwise, is not thereby discharged from his obligations incurred under the express covenants of the lease.

In re Orne, 12 Federal Reporter, 779.

Martin v. *Black*, 9th Pages Chancery, 641.

In re Washburn, 11th Nat. Bank Reg. Rep., 66.

Beale v. *Thompson*, 3 B. & P., 420.

Paradine v. *Jane*, Aleyn's Reports, p. 26.

Mills v. *Auriole*, 1 H. Blackstone's Reports, 433; 4 Term Rep., 94; Smith's Leading Cases (8th Ed.), p. 1255.

Boot v. *Wilson*, 8 East's Reports, 318.

Marks v. *Upton*, 7 Term Rep., 305.

Fisher v. *Milliken*, 8 Penn. St., 120.

Wall v. *Hinds*, 4 Gray, 256.

Thursby v. *Plant*, 1 Saund., 240.

II.

The insolvency of a national bank and appointment of a receiver by the comptroller of the currency do not dissolve the corporation. It remains liable on all its obligations legally entered into before insolvency.

National Bank v. *Life Insurance Co.*, 14 Otto (104 U. S.), 54.

Bank of Bethel v. *Pahquioque Bank*, 14 Wallace, 388.

Security Bank v. *National Bank*, 2 Hun., 287.

Chemical National Bank v. *Bailey*, 12 Blatchford, 480.

Jones v. *Bank of Leadville*, 10 Colo., 464.

Ordway v. *Central National Bank*, 47 Md., 217.

White v. *Knox*, 111 U. S., 787.

III.

There is no language in the National-bank Act which, directly or by implication, can relieve an insolvent national bank from its obligations incurred under an unexpired lease entered into before insolvency.

Irons v. *Manufacturers' National Bank*, 6 Bissell, 301.

Richmond v. *Irons*, 121 U. S., 48.

Ex parte Houghton, 1 Lowell, 554.

U. S. Rev. Stat., Secs. 5,136, 5,151, 5,220–22, 5,228, 5,234 and 5,236.

Supplement to U. S. Rev. Stat., Chap. 156, Secs. 1 and 3, Act of June 30, 1876.

ARGUMENT.

I.

A LESSEE WHO DURING THE TERM RENDERS THE PERFORMANCE OF HIS PART OF THE CONTRACT IMPOSSIBLE, WHETHER BY HIS INSOLVENCY OR OTHERWISE, IS NOT THEREBY DISCHARGED FROM HIS OBLIGATIONS INCURRED UNDER THE EXPRESS COVENANTS OF THE LEASE.

If it be conceded that the lessor has itself done nothing to terminate its rights under the lease, and that the lessee is still in existence, then the conclusion, as a proposition applicable to insolvents generally, must follow, that the lessee remains liable to the landlord under the covenants of the lease. The condition of insolvency or bankruptcy will not of itself release the insolvent from liability under a lease.

The leading English authority in support of this proposition is *Mills* v. *Auriole*, 4 Term Rep., 94. It was there held that an express covenant to pay rent was not released by bankruptcy. This position is maintained by a line of English decisions.

In the case *in re Orne*, decided by the United States Circuit court for the Eastern District of Pennsylvania, 12 Fed. Rep., 779, the facts were these:

A written lease had been entered into between Fisher's trustee, lessor, and Orne, lessee, for a term of two years. The lease contained *inter alia*, the following clauses:

"And the lessees for themselves, their legal representatives and assigns, do hereby covenant and agree with the lessors, their legal representatives and assigns, to

Bank of Bethel v. *Pahquioque Bank*, 14 Wallace, 388.

Security Bank v. *National Bank*, 2 Hun., 287.

Chemical National Bank v. *Bailey*, 12 Blatchford, 480.

Jones v. *Bank of Leadville*, 10 Colo., 464.

Ordway v. *Central National Bank*, 47 Md., 217.

White v. *Knox*, 111 U. S., 787.

III.

There is no language in the National-bank Act which, directly or by implication, can relieve an insolvent national bank from its obligations incurred under an unexpired lease entered into before insolvency.

Irons v. *Manufacturers' National Bank*, 6 Bissell, 301.

Richmond v. *Irons*, 121 U. S., 48.

Ex parte Houghton, 1 Lowell, 554.

U. S. Rev. Stat., Secs. 5,136, 5,151, 5,220–22, 5,228, 5,234 and 5,236.

Supplement to U. S. Rev. Stat., Chap. 156, Secs. 1 and 3, Act of June 30, 1876.

ARGUMENT.

I.

A LESSEE WHO DURING THE TERM RENDERS THE PERFORMANCE OF HIS PART OF THE CONTRACT IMPOSSIBLE, WHETHER BY HIS INSOLVENCY OR OTHERWISE, IS NOT THEREBY DISCHARGED FROM HIS OBLIGATIONS INCURRED UNDER THE EXPRESS COVENANTS OF THE LEASE.

If it be conceded that the lessor has itself done nothing to terminate its rights under the lease, and that the lessee is still in existence, then the conclusion, as a proposition applicable to insolvents generally, must follow, that the lessee remains liable to the landlord under the covenants of the lease. The condition of insolvency or bankruptcy will not of itself release the insolvent from liability under a lease.

The leading English authority in support of this proposition is *Mills* v. *Auriole*, 4 Term Rep., 94. It was there held that an express covenant to pay rent was not released by bankruptcy. This position is maintained by a line of English decisions.

In the case *in re Orne*, decided by the United States Circuit court for the Eastern District of Pennsylvania, 12 Fed. Rep., 779, the facts were these:

A written lease had been entered into between Fisher's trustee, lessor, and Orne, lessee, for a term of two years. The lease contained *inter alia*, the following clauses:

"And the lessees for themselves, their legal represen-
" tatives and assigns, do hereby covenant and agree with
" the lessors, their legal representatives and assigns, to

"promptly pay the rent hereby reserved on the day and "times herein specified.

"Provided always, and these presents are on condition "that the lessees shall faithfully perform said covenants, "and on breach of any of them it shall be lawful for "the lessors to re-enter on the premises as of their "former estate. And it is further expressly agreed that "in case the lessees shall violate any of the covenants "herein contained, on their part to be performed, then "the lessors shall have the power to terminate this "lease, and any attorney in behalf of the lessees may "sign an agreement for entering an action of ejectment "in any court of competent jurisdiction. No such termination of this lease, or taking or recovering possession "of the premises shall deprive the lessors of any action "for rent or for damages for the breach of any covenant "herein contained."

After occupying the premises for about ten months the lessee went into bankruptcy; the lessors thereupon rented the premises to other tenants at a lower rental, and presented their claim against the bankrupt estate for damages for the breach of the covenant to pay rent, the rent accruing after the assignee vacated, less the sums received from the new tenants.

McKENNAN, C. J., said: "The argument of appellant's "counsel is ingenious and impressive, and if his premises are conceded his conclusions cannot be gainsaid. "If the lease between Orne and Fisher's trustee was "surrendered, with intent to terminate it, the trustee "could not assert any claim for a subsequent alleged "breach of it for the obvious reason that a contract, "canceled by agreement of the parties, ceases to exist "thereafter and is not susceptible of any breach. And "so, if the trustees evicted their tenant, their right to "demand and recover rent from him was thereby suspended. But there was neither an eviction of the tenant nor a surrender of the lease. *Practically there "was an abandonment of the leased premises by the tenant.* He was in default for rent accrued, confessedly "became insolvent and unable to pay the rent as it might "fall due, and transferred his leasehold interest and the "possession of the leased premises to his assignee. The "assignee went into possession, paid the rent in arrear, "under the constraint of a distress warrant, retained possession for about two months, paying the rent for that "period, but declined to accept the lease. * * *

"Now the fair import of these circumstances is that "the tenant did not intend to keep the premises, or to "pay the accruing rent, or to observe his covenant, and "that he actually vacated and abandoned the premises "without the consent of the landlord. Certainly the "landlord did not agree to a termination of the lease, "and it is clear to me that his acts did not warrant such "an implication. * * *

"I am therefore of the opinion that *proof of damages, "measured by the amount of the rent which the tenant "covenanted to pay for the remainder of the term, less "the sums received by the trustees for intermediate "leases to others, was properly allowed.*"

The plaintiff in the present case (defendant in error here) by the stipulation entered into with the receiver, (page 19 of Transcript) disclaimed any intention to terminate the lease, and expressly reserved all rights against the receiver, the bank and its stockholders. The lease, so far as it charged the lessee, therefore, remained in full force and effect, and the lessor by renting the premises to the receiver, accepting from him rent for the period until August 1st, during which he occupied the premises, and crediting the amount so received to the lessee's account, acted under the covenant of the lease, which was entered into by the parties thereto, *expressly for the purpose of providing for just the contingency which happened.* Covenants implied by law may be made ineffective by circumstances, but express covenants, never. The idea is well stated in *Beale* v. *Thompson*, 3 Bosanquet & Puller, 420, a case regarding a breach of express covenant contained in a lease, "If a party enter "into an absolute contract, without any qualification or "exception, he must abide by the contract and *either* "*do the act or pay damages*, his liability arising from his "own direct and positive undertaking."

In *Paradine* v. *Jane*, Aleyn's reports, page 26, a leading case, "Plaintiff declared upon a lease for years "rendering rent at the four usual Feasts. The Defendant pleads that a certain German Prince, by name "Prince RUPERT, an alien born, enemy to the King & "Kingdom, had invaded the Realm with an hostile Army "of men; and with the same force did enter upon the "defendant's possession, and him expelled, and held out "of possession, whereby he could not take the profits. "Plaintiff demurred, and plea was resolved insufficient; "And this difference was taken, that where the Law "creates a duty or charge, and the party is disabled to "perform it without any default in him, and hath no "remedy over, there the Law will excuse him, but when "the party *by his own Contract* creates a duty or charge "upon himself, *he is bound to make it good*, if he may, "notwithstanding any accident by inevitable necessity, "because he might have provided against it by his Contract."

Nor does the action of the receiver in rejecting the lease deprive the landlord of his right. It is conceded that the receiver acted within his well defined powers and exercised a lawful discretion in giving notice of his election to terminate the lease on July 31st, *so far as he, as receiver, was concerned*, but more than this he could not do. Within a reasonable time after taking possession of the leased premises, he determined that the balance of the term would not be a valuable asset of the insolvent bank, and it thereupon became his duty as a trustee of the assets for the benefit of creditors, to reject such an asset which, instead of yielding an income, would be a burden; this action of his could in no way, however, affect the *contract obligation existing between the lessee and lessor*. He could not impair the obligation of this contract.

Martin v. *Black*, 9th Page's Ch., 641.
In re Washburn, 11th Nat. Bank, Reg. Rep., 66.

It should be stated that this suit is not brought to compel the receiver to accept the term which he has formally rejected; it is essential to distinguish carefully between the action of the receiver, as a trustee of the funds coming into his possession, in rejecting the lease *as an asset*, and the action of the receiver as a representative of the Comptroller of the Currency, passing, in a semi-judicial capacity, upon the *validity of the lease as a claim* against the insolvent. In the former capacity the receiver has properly exercised a discretion vested in him, which is final and not subject to judicial review. In the latter capacity, in rejecting a claim, his action is by no means binding or final, and is by statute and adjudication made expressly subject to review by a court of competent jurisdiction.

U. S. Revised Statutes, Sec. 5236.

Were this, therefore, an action against a bankrupt individual or an insolvent corporation, other than a national bank, this claim could be legally established by judgment against the bankrupt or insolvent; but the contention seems to be that a national bank differs from all other insolvents, whether individuals or corporations, in this regard. If, however, the Chemical National Bank of Chicago still exists as a corporate entity, as it unquestionably does, wherein lies that peculiar quality or distinction which can give it an immunity not possessed by other insolvents ?

Is it not true that in the absence of an express statutory provision to the contrary, the general rule of law must govern ? In the case *Irons* v. *Manufacturers' National Bank*, 6 Bissell, 301, the Comptroller of the Currency had been requested to appoint a receiver for the bank, which was insolvent. The Comptroller responded, in substance, that the bank had complied with the law and had deposited government notes with the United States Treasurer, so that its obligations to the government were discharged; that he, therefore, had no authority to appoint a receiver. A bill was thereupon filed asking the court to appoint a receiver under the general rule of law in such cases. Upon an examination of the Bank Act the court found that the Comptroller's position was well taken, and that his authority to appoint a receiver was limited, by the Act, to certain specified cases, not including the one there presented. Judge BLODGETT in deciding that in such a case the court had power to place the bank in the hands of a receiver says, in substance, that after carefully examining the banking law, and the decisions of the Supreme court and those of various states made since this banking law took effect, he finds nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to lead to the conclusion that a corporation created, as this is, under an act of Congress for certain specific purposes, does not come within the general provision of the law regulating the remedies of creditors as against a national banking corporation as much as against any other corporation, except where there are specific provisions to meet those cases. The opinion of the learned judge, as interpreting the effect of the entire Act upon the general law governing insolvency, is valuable in this connection. He could find no distinction between an insolvent national bank, and any other insolvent, unless under specific statutory provisions.

To what extent the case at bar falls within the specific provisions of the National-bank Act will be considered further on, but unless some provision shall be found which so expressly applies to cases similar to the present one, as to remove them from the operation of the general rule of law, namely, that insolvency does not in itself nullify a contract or excuse the insolvent from the performance of its obligations thereunder, the conclusion must follow that the defendant insolvent, although a national bank, still remains liable in damages under the lease.

made expressly subject to review by a court of competent jurisdiction.

U. S. Revised Statutes, Sec. 5236.

Were this, therefore, an action against a bankrupt individual or an insolvent corporation, other than a national bank, this claim could be legally established by judgment against the bankrupt or insolvent; but the contention seems to be that a national bank differs from all other insolvents, whether individuals or corporations, in this regard. If, however, the Chemical National Bank of Chicago still exists as a corporate entity, as it unquestionably does, wherein lies that peculiar quality or distinction which can give it an immunity not possessed by other insolvents?

Is it not true that in the absence of an express statutory provision to the contrary, the general rule of law must govern? In the case *Irons* v. *Manufacturers' National Bank*, 6 Bissell, 301, the Comptroller of the Currency had been requested to appoint a receiver for the bank, which was insolvent. The Comptroller responded, in substance, that the bank had complied with the law and had deposited government notes with the United States Treasurer, so that its obligations to the government were discharged; that he, therefore, had no authority to appoint a receiver. A bill was thereupon filed asking the court to appoint a receiver under the general rule of law in such cases. Upon an examination of the Bank Act the court found that the Comptroller's position was well taken, and that his authority to appoint a receiver was limited, by the Act, to certain specified cases, not including the one there presented. Judge BLODGETT in deciding that in such a case the court had power to place the bank in the hands of a receiver says, in substance, that after carefully examining the banking law, and the decisions of the Supreme court and those of various states made since this banking law took effect, he finds nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to lead to the conclusion that a corporation created, as this is, under an act of Congress for certain specific purposes, does not come within the general provision of the law regulating the remedies of creditors as against a national banking corporation as much as against any other corporation, except where there are specific provisions to meet those cases. The opinion of the learned judge, as interpreting the effect of the entire Act upon the general law governing insolvency, is valuable in this connection. He could find no distinction between an insolvent national bank, and any other insolvent, unless under specific statutory provisions.

To what extent the case at bar falls within the specific provisions of the National-bank Act will be considered further on, but unless some provision shall be found which so expressly applies to cases similar to the present one, as to remove them from the operation of the general rule of law, namely, that insolvency does not in itself nullify a contract or excuse the insolvent from the performance of its obligations thereunder, the conclusion must follow that the defendant insolvent, although a national bank, still remains liable in damages under the lease.

II.

THE INSOLVENCY OF A NATIONAL BANK AND APPOINTMENT OF A RECEIVER BY THE COMPTROLLER OF THE CURRENCY, DO NOT DISSOLVE THE CORPORATION. IT REMAINS LIABLE ON ALL ITS OBLIGATIONS LEGALLY ENTERED INTO BEFORE INSOLVENCY.

The question then arises, is the Chemical National Bank of Chicago still existent for all purposes necessary for its proper and legal dissolution, and for the purpose of satisfying the legal obligations which it has incurred? Having been duly organized on December 15, 1891, under the National-bank Act of the United States, to have succession for a period of twenty years from its organization, it would be presumed to continue in existence until terminated by lapse or by proper proceedings and judicial determination. No legal proceedings by *quo warranto*, or otherwise, have been taken to dissolve the defendant corporation, to withdraw its charter, or otherwise to terminate its corporate life. There is no claim that any such steps for dissolution have even been instituted. The contrary is conceded. Beyond the fact that a receiver has been appointed, no move has been made and no act has been done which can be held to have destroyed the corporate existence, and unless the appointment of a receiver in itself has such an effect, the conclusion is inevitable that the banking corporation still exists. Does, then, the appointment of a receiver in itself, actually or in a technical sense, dissolve the corporation? Clearly it does not.

No obscure part of the act in question has been more lucidly expounded by this court than that of the bank's status after it has ceased doing business, either voluntarily or involuntarily. The defense has been repeatedly urged, as is done in this case, that by the mere act of appointing a receiver or closing its affairs, the corporation is wiped out of existence; that " for all practical purposes," the association is dissolved.

In *National Bank* v. *Life Insurance Co.*, 14 Otto (104 U. S.) 54, a claim was made against the National Bank for an amount deposited in trust, which the bank had applied toward the payment of the trustee's individual debt, and a bill was filed to prevent it from disposing of all its assets without withholding a sufficient fund to satify the claim. Thereafter the bank went into voluntary liquidation under Sections 5220–5222 of the United States Revised Statutes, deposited legal tender notes with the Treasurer of the United States, as provided in Section 5222, ceased doing any new banking business, paid its depositors, reduced its assets to cash and distributed the balance among its shareholders, paying them back their capital in full and two per cent. interest. Every step, required by the statute to close the association, had been taken. Mr. Justice MATTHEWS in delivering the opinion of this court says: " It is claimed that these facts show a dissolution of the Corporation.

" It is provided by Section 5136 of the Rev. Stat. of " the U. S., that every national bank, duly incorporated, " shall 'have succession for the period of twenty years from " its organization, unless it is sooner dissolved according " to the provisions of its articles of association, or by the " act of its shareholders owning two-thirds of its stock, " or unless its franchise becomes forfeited by some viola- " tion of law.' " The court then quotes Sections 5220–5222 of the Revised Statutes of the U. S., and continues,

II.

THE INSOLVENCY OF A NATIONAL BANK AND APPOINTMENT OF A RECEIVER BY THE COMPTROLLER OF THE CURRENCY, DO NOT DISSOLVE THE CORPORATION. IT REMAINS LIABLE ON ALL ITS OBLIGATIONS LEGALLY ENTERED INTO BEFORE INSOLVENCY.

The question then arises, is the Chemical National Bank of Chicago still existent for all purposes necessary for its proper and legal dissolution, and for the purpose of satisfying the legal obligations which it has incurred? Having been duly organized on December 15, 1891, under the National-bank Act of the United States, to have succession for a period of twenty years from its organization, it would be presumed to continue in existence until terminated by lapse or by proper proceedings and judicial determination. No legal proceedings by *quo warranto*, or otherwise, have been taken to dissolve the defendant corporation, to withdraw its charter, or otherwise to terminate its corporate life. There is no claim that any such steps for dissolution have even been instituted. The contrary is conceded. Beyond the fact that a receiver has been appointed, no move has been made and no act has been done which can be held to have destroyed the corporate existence, and unless the appointment of a receiver in itself has such an effect, the conclusion is inevitable that the banking corporation still exists. Does, then, the appointment of a receiver in itself, actually or in a technical sense, dissolve the corporation? Clearly it does not.

No obscure part of the act in question has been more lucidly expounded by this court than that of the bank's status after it has ceased doing business, either voluntarily or involuntarily. The defense has been repeatedly urged, as is done in this case, that by the mere act of appointing a receiver or closing its affairs, the corporation is wiped out of existence; that " for all practical purposes," the association is dissolved.

In *National Bank* v. *Life Insurance Co.*, 14 Otto (104 U. S.) 54, a claim was made against the National Bank for an amount deposited in trust, which the bank had applied toward the payment of the trustee's individual debt, and a bill was filed to prevent it from disposing of all its assets without withholding a sufficient fund to satify the claim. Thereafter the bank went into voluntary liquidation under Sections 5220–5222 of the United States Revised Statutes, deposited legal tender notes with the Treasurer of the United States, as provided in Section 5222, ceased doing any new banking business, paid its depositors, reduced its assets to cash and distributed the balance among its shareholders, paying them back their capital in full and two per cent. interest. Every step, required by the statute to close the association, had been taken. Mr. Justice MATTHEWS in delivering the opinion of this court says: " It is claimed that these facts show a dissolution of the Corporation.

" It is provided by Section 5136 of the Rev. Stat. of " the U. S., that every national bank, duly incorporated, " shall 'have succession for the period of twenty years from " its organization, unless it is sooner dissolved according " to the provisions of its articles of association, or by the " act of its shareholders owning two-thirds of its stock, " or unless its franchise becomes forfeited by some viola- " tion of law.' " The court then quotes Sections 5220–5222 of the Revised Statutes of the U. S., and continues,

" It is to be observed that the sections under which the " proceedings took place, which, it is claimed, put an " end to the corporate existence of the bank, do not re- " fer, in terms, to a dissolution of the corporation, and " *there is nothing in the language which suggests it in* " *the technical sense in which it is used here as a defense.* " The association goes into liquidation, and is closed. It " is required to give notice that it is closing up its affairs, " and in order to do so completely and effectually, to notify " its creditors to present their claims for payment. And " the redemption of its bonds given to secure the pay- " ment of its circulating notes, by the required deposit " of money in the treasury, is limited in its effect to a " discharge of the association and its shareholders *from* " *all liability upon its circulating notes.* The very pur- " pose of the liquidation provided for *is to pay the debts* " *of the Corporation*, that the remainder of the assets, " being reduced to money, may be distributed among " the stockholders. That distribution cannot take place " *with any show of justice, and according to the intent* " *of the law, until all* liabilities to creditors *have been* " *honestly met and paid.* If there are claims made " which the directors of the association are not willing to " acknowledge as just debts, there is nothing in the stat- " ute which is inconsistent with the right of the claimant " to obtain a judicial determination of the controversy " by process against the association; nor with that of the " association to collect by suit debts due to it. It is " clearly, we think, the intention of the law that it " should continue to exist, as a person in law, capable of " suing and being sued, until its affairs and business are " *completely settled.* The proceeding prescribed by the " law seems to resemble not the technical dissolution of "a corporation, without any saving as to the common "law consequences, but rather that of the *dissolution of* "*a copartnership*, which, nevertheless, continues to "subsist for the purpose of liquidation and winding up "its business."

The court then cites *Bank of Bethel* v. *Pahquioque Bank*, 14 Wallace, 383, and continues:

"In that case it was argued, as in this, that as the "only constitutional warrant for the existence of the na-"tional bank was its connection with the government as "a fiscal agent, the severance of that connection *ipso* "*facto* deprived it of vitality. The same argument would "render it incapable of returning to its stockholders "their capital and accumulated profits. *If it was a rea-*"*sonable incident to its living that it should contract* "*debts, it is equally a reasonable incident to its disso-*"*lution that it should pay them.* We see no constitu-"tional impediment that prevents it."

The above was a case of voluntary liquidation. In the case *Bank of Bethel* v. *Pahquioque Bank*, 14 Wallace, 388, the opinion in which was re-adopted by this court and incorporated into the opinion above, the insolvent bank was placed in the hands of a *receiver*, and the same defense was urged, that by such appointment, the corporation became defunct. It will be unnecessary to quote from the opinion in that case. It was held that such appointment did not carry with it the result claimed, but that the association continued to exist. It is not insisted that *quo warranto* is the only and essential method of finally dissolving the association, but until that or some other equally positive and summary step is taken, the corporation exists, *until every debt is paid or claim adjudicated*; in other words until the affairs of the association are fully administered.

"It is to be observed that the sections under which the
"proceedings took place, which, it is claimed, put an
"end to the corporate existence of the bank, do not re-
"fer, in terms, to a dissolution of the corporation, and
"*there is nothing in the language which suggests it in*
"*the technical sense in which it is used here as a defense.*
"The association goes into liquidation, and is closed. It
"is required to give notice that it is closing up its affairs,
"and in order to do so completely and effectually, to notify
"its creditors to present their claims for payment. And
"the redemption of its bonds given to secure the pay-
"ment of its circulating notes, by the required deposit
"of money in the treasury, is limited in its effect to a
"discharge of the association and its shareholders *from*
"*all liability upon its circulating notes.* The very pur-
"pose of the liquidation provided for *is to pay the debts*
"*of the Corporation*, that the remainder of the assets,
"being reduced to money, may be distributed among
"the stockholders. That distribution cannot take place
"*with any show of justice, and according to the intent*
"*of the law, until all* liabilities to creditors *have been*
"*honestly met and paid.* If there are claims made
"which the directors of the association are not willing to
"acknowledge as just debts, there is nothing in the stat-
"ute which is inconsistent with the right of the claimant
"to obtain a judicial determination of the controversy
"by process against the association; nor with that of the
"association to collect by suit debts due to it. It is
"clearly, we think, the intention of the law that it
"should continue to exist, as a person in law, capable of
"suing and being sued, until its affairs and business are
"*completely settled.* The proceeding prescribed by the
"law seems to resemble not the technical dissolution of

" a corporation, without any saving as to the common " law consequences, but rather that of the *dissolution of* " *a copartnership*, which, nevertheless, continues to " subsist for the purpose of liquidation and winding up " its business."

The court then cites *Bank of Bethel* v. *Pahquioque Bank*, 14 Wallace, 383, and continues:

"In that case it was argued, as in this, that as the " only constitutional warrant for the existence of the national bank was its connection with the government as " a fiscal agent, the severance of that connection *ipso* " *facto* deprived it of vitality. The same argument would " render it incapable of returning to its stockholders " their capital and accumulated profits. *If it was a reasonable incident to its living that it should contract* " *debts, it is equally a reasonable incident to its dissolution that it should pay them.* We see no constitutional impediment that prevents it."

The above was a case of voluntary liquidation. In the case *Bank of Bethel* v. *Pahquioque Bank*, 14 Wallace, 388, the opinion in which was re-adopted by this court and incorporated into the opinion above, the insolvent bank was placed in the hands of a *receiver*, and the same defense was urged, that by such appointment, the corporation became defunct. It will be unnecessary to quote from the opinion in that case. It was held that such appointment did not carry with it the result claimed, but that the association continued to exist. It is not insisted that *quo warranto* is the only and essential method of finally dissolving the association, but until that or some other equally positive and summary step is taken, the corporation exists, *until every debt is paid or claim adjudicated*; in other words until the affairs of the association are fully administered.

The cases above cited appear to admit of no further doubt. But there is one other and possibly still more conclusive proof of the intent of Congress. Chapter 156, Sec., 3, of the act of June 30th, 1876, supplement to the Rev. Stat. of the U. S., Vol. 1, provides as follows :

" That whenever any association shall have been or " shall be placed in the hands of a receiver, as provided " in section *fifty-two hundred and thirty-four* and other " sections of said statutes, and when, as provided in section " *fifty-two hundred and thirty-six thereof*, the Comptroller " shall have paid to each and every creditor of such association, not including shareholders, who are creditors of such association, whose claim or claims as such " creditor shall have been proved or allowed as therein " prescribed, the full amount of such claims, and all expenses of the receivership, and the redemption of the " circulating notes of such association shall have been " provided for by depositing lawful money of the United " States with the treasurer of the United States, the " Comptroller of the Currency shall call a meeting of the " shareholders of such association by giving notice " thereof for thirty days in a newspaper published in the " town, city or county where the business of such association was carried on, or if no newspaper is there " published, in the newspaper published nearest thereto, " at which meeting the shareholders shall elect an agent, " voting by ballot, in person or by proxy, each share of " stock entitling the holder to one vote;

" And when such agent shall have received votes representing at least a majority of the stock in value and " number of shares, and when any of the shareholders " of the association shall have executed and filed a bond " to the satisfaction of the Comptroller of the Currency, conditioned *for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court*, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them;

"And for this purpose said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer or other instrument in writing that may be necessary and proper; *whereupon the said Comptroller and the said receiver shall*, by virtue of this act, *be discharged and released* from any and all liabilities to such associations, and to each and all of the creditors and shareholders thereof;

"And such agent is hereby authorized to sell, compromise or compound the debts due to such association upon the order of a competent court of record or of the United States circuit court for the district where the business of the association was carried on.

"Such agent shall hold, control and dispose of the assets and property of any association which he may receive, as hereinbefore provided for the benefit of the shareholders of such associations as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and *he may in his own name or in the name of such association, sue and be sued*, and do all other law-

"ful acts and things necessary to *finally settle* and "distribute the assets and property in his hands."

It thus appears that after the Comptroller of the Currency and the receiver appointed by him have finished their work and have been discharged, the association, represented by an agent, *still lives on*, with power of suing and of being sued, and to do all other lawful acts and things necessary to *finally settle* and distribute the assets and property, if any, of the association. In view of such a provision, how can it be contended that by the appointment of a receiver, the right to establish a just claim against the association and its stockholders is in the least degree impaired? This section clears away any doubt which might remain on that point, and is equally for the benefit of stockholders and belated claimants; that the former may husband the assets which remain; that the latter may still have a fund out of which to satisfy their claims; and that the insolvent, through its agent, may still remain liable, without limit as to time, "*for the payment and discharge in full of any and every claim*" that may thereafter be proved.

The case *Fidelity Safe Deposit & Trust Co.* v. *Armstrong*, 35 Fed. Rep., 567, cited by counsel for plaintiff in error, is of little or no value as a precedent in the case at bar. The receiver, not the banking association, was the defendant to that suit. The decision rested solely upon the ground that the *bank's charter had been actually forfeited* by judicial decree, and that therefore, "*the lessee had ceased to exist and had no successor "who, in the eye of the law, stood in its place.*"

Whether the conclusions of the court in that case were correct may well be doubted. That was apparently a proceeding under Section 5,239 of the statutes, which provides that in case the directors shall knowingly violate or permit any of the officers of the association to violate any of the provisions of the Act, *all the rights, privileges and franchises of the association shall be thereby forfeited*, which forfeiture shall be determined by a proper United States court in a suit brought for that purpose by the Comptroller of the Currency. It will be unnecessary for this court to review or pass upon the questions there presented; they have no weight or bearing in the case at bar. Judge TAFT there held that under the exact language of that section the association had absolutely passed out of existence. His conclusions further rest upon the authority of *Deane* v. *Caldwell*, 127 Mass., 242, a case decided by Mr. Chief Justice GRAY, and the court found expressly that the landlord had, by his own acts annulled the contract; that *there had been a surrender by operation of law*. Furthermore, that case involved the interpretation of a Massachusetts bankruptcy act, which *allowed no debts to be proved except such as were* ABSOLUTELY *due*. The court then says, in part: "In " the case of a *living bankrupt*, or insolvent, any liabil- " ities which could not be proved against his estate are " not discharged by his certificate, and may be after- " wards enforced against him. But when the estate of a " *deceased* person is insolvent, *there is no debtor surviv-* " *ing*, and any claims of creditors that do not ripen into " debts which may be sued against the executor or ad- " ministrator, or proven against the estate *before the* " *final distribution* of the assets, are wholly lost. It is " not doubted that debts depending upon no contingen- " cy, though not payable until a future day, may be " proved before the commissioners, and it has always " been held that any *contingent liabilities* arising *out of*

"*contracts* of the deceased, *which become absolute* debts
" at any time before being presented to the commission-
" ers, may be allowed, although those which do not be-
" come absolute debts until after the *return* of the com-
" mission *and the distribution of the estate* are neces-
" sarily cut off."

Counsel for plaintiff in error however endeavors to bring the case at bar within the reason of the *Fidelity Safe Deposit* case, and of Section 5239 of the statutes, by arguing that "*for all practical purposes*" the appointment of a receiver amounts to a dissolution of the association, and that there is no sound reason for holding that a wilful violation by the directors or officers of the provisions of the Act shall have one effect, while mere insolvency and the appointment of a receiver shall have a different effect. In other words, why is *Section 5239* of the Revised Statutes not the same as *Section 5234?* The answer seems plain; because Congress has seen fit to make different provisions to fit the two entirely different cases. It might be asked with as much show of reason, why in case of *voluntary liquidation* does the statute give creditors the right to enforce the stockholders' liability directly by bill in equity, whereas in cases of *involuntary* liquidation they are denied that right, and must await the action of the receiver. Section 5239 provides in plain language that the forfeiture of a franchise must be accomplished, in cases of wilful violation, by a proper United States court, while Section 5234 provides only that a receiver shall be appointed who shall proceed to close up the association. Had Congress intended that the result should be *the same* in either case, why should it have gone to such particular pains in stating that the effect should *be different?*

The meaning of the section which says that the receiver "*shall proceed to close up the association*," seems perfectly clear; it is that the receiver shall set about *in the usual way* to wind up the business, collect all assets and settle all outstanding obligations. Had the statute meant that on the appointment of a receiver the association shall be considered *already and forever closed*, it would have said so. Had the statute meant that no debts should be paid except those *absolutely due* at the date of insolvency, it surely would have said so.

There is no occasion for a strained construction, contrary to all the rules of interpretation, particularly as the plain, ordinary, rational construction is the one which alone is just and equitable. Had it been the intention of the framers of this Bank Act to provide that the appointment of a receiver should have the effect which is claimed, it would have been so natural and easy for them to say so, that in the absence of any such provision the intention should not be inferred.

The plain, rational meaning of the section of the Bank Act, in question, seems clearly to be that upon the appointment of a receiver, the corporation, through its directors, is incapacitated from doing any *new business*. It could not issue new notes; it could not receive new deposits, and it *could not enter into a new lease*. But the obligations already incurred and outstanding have to be taken care of even though it requires an assessment upon the stock to do so. The association can bite nothing more off, but it has to digest what it has already bitten. And there is not one word in the entire Act which says or can mean that by the appointment of a receiver the corporate life is ended.

In the Fidelity Bank case the court further says that

the rent was payable at the *end* of each month, and that up to the time when the receiver was appointed and the charter withdrawn *there had been no breach.*

The rent in the case at bar was due and payable *on the first* of the month. The bank took possession of the premises *on May 1st*, and the rent for that month should have been paid on that day; it in fact was not paid; *there* occurred the first breach of contract, before a receiver had been appointed and before the insolvency of the bank was even suspected by the lessor. Had the appellant desired to avail itself of this breach for the complete cancellation of the lease, no further step or action on its part would have been called for. The lease in terms provides that if the lessee shall fail to perform and observe any or either of the covenants in said lease contained, the lessor may immediately, *whilst such neglect or default continues, and without further notice or demand*, enter and repossess said premises. Thus the breach of a covenant was complete and unless there had been some act by the lessor showing a waiver of the right to terminate, the "neglect or default continues" and has continued from that time forward.

In the enforced abandonment of the premises by the insolvent bank when the Comptroller of the Currency took possession, the same breach was but carried on and here again the right of the landlord to re-enter, *without notice*, is reserved in the lease. The terms of the contract were at that time already broken and though this subsequent breach may have been more positive in its nature, its effect was but cumulative. The default dated from May 1st, it grew beyond recall when the abandonment occurred. The lessor's right of action was ripe and ready to be enforced after May 1st, and could have been begun

then or at any time within the period of statutory limitation. *There had been a direct breach of contract and impossibility of performance on the part of the lessee.* Nothing additional was necessary to perfect the cause of action or the legality of the claim as it stood at the time the insolvency occurred, the damage had then been done, the pecuniary amount only of such damage remained to be ascertained and the measure of this damage is the rent reserved under the lease, with such deductions as should be made for re-letting. This is in accordance with the express provision contained in the lease. To be sure, the receiver who took possession not long afterwards paid rent for the time the premises were occupied by himself and by the bank examiner, both representatives of the Comptroller of Currency, and this amount so paid should apply on and be deducted from the amount due from the bank, just as rent collected after a re-letting of the premises should so apply; the receiver did not pay this rent as the representative or agent of the bank; he is the representative of the Comptroller and the statutory assignee. He paid for the use of the premises, as any stranger to the lease would have done, for the time during which he and the bank examiner were in possession. While the breach of contract, therefore, occurred on the 1st day of May, 1893, the exact amount of damages which the lessee ought in consequence to pay was not fairly ascertainable until the deductions to which it was entitled had been fixed, and the only deduction for the first year covered by this suit was the amount paid by the receiver.

Counsel for plaintiff in error still insists upon thinking that the receiver is the representative solely of the bank, and, therefore necessarily hostile to this claimant. He still repeats, as he said in the court below, that no claim

the rent was payable at the *end* of each month, and that up to the time when the receiver was appointed and the charter withdrawn *there had been no breach.*

The rent in the case at bar was due and payable *on the first* of the month. The bank took possession of the premises *on May 1st*, and the rent for that month should have been paid on that day; it in fact was not paid; *there* occurred the first breach of contract, before a receiver had been appointed and before the insolvency of the bank was even suspected by the lessor. Had the appellant desired to avail itself of this breach for the complete cancellation of the lease, no further step or action on its part would have been called for. The lease in terms provides that if the lessee shall fail to perform and observe any or either of the covenants in said lease contained, the lessor may immediately, *whilst such neglect or default continues, and without further notice or demand*, enter and repossess said premises. Thus the breach of a covenant was complete and unless there had been some act by the lessor showing a waiver of the right to terminate, the "neglect or default continues" and has continued from that time forward.

In the enforced abandonment of the premises by the insolvent bank when the Comptroller of the Currency took possession, the same breach was but carried on and here again the right of the landlord to re-enter, *without notice*, is reserved in the lease. The terms of the contract were at that time already broken and though this subsequent breach may have been more positive in its nature, its effect was but cumulative. The default dated from May 1st, it grew beyond recall when the abandonment occurred. The lessor's right of action was ripe and ready to be enforced after May 1st, and could have been begun

then or at any time within the period of statutory limitation. *There had been a direct breach of contract and impossibility of performance on the part of the lessee.* Nothing additional was necessary to perfect the cause of action or the legality of the claim as it stood at the time the insolvency occurred, the damage had then been done, the pecuniary amount only of such damage remained to be ascertained and the measure of this damage is the rent reserved under the lease, with such deductions as should be made for re-letting. This is in accordance with the express provision contained in the lease. To be sure, the receiver who took possession not long afterwards paid rent for the time the premises were occupied by himself and by the bank examiner, both representatives of the Comptroller of Currency, and this amount so paid should apply on and be deducted from the amount due from the bank, just as rent collected after a re-letting of the premises should so apply; the receiver did not pay this rent as the representative or agent of the bank; he is the representative of the Comptroller and the statutory assignee. He paid for the use of the premises, as any stranger to the lease would have done, for the time during which he and the bank examiner were in possession. While the breach of contract, therefore, occurred on the 1st day of May, 1893, the exact amount of damages which the lessee ought in consequence to pay was not fairly ascertainable until the deductions to which it was entitled had been fixed, and the only deduction for the first year covered by this suit was the amount paid by the receiver.

Counsel for plaintiff in error still insists upon thinking that the receiver is the representative solely of the bank, and, therefore necessarily hostile to this claimant. He still repeats, as he said in the court below, that no claim

the rent was payable at the *end* of each month, and that up to the time when the receiver was appointed and the charter withdrawn *there had been no breach.*

The rent in the case at bar was due and payable *on the first* of the month. The bank took possession of the premises *on May 1st*, and the rent for that month should have been paid on that day; it in fact was not paid; *there* occurred the first breach of contract, before a receiver had been appointed and before the insolvency of the bank was even suspected by the lessor. Had the appellant desired to avail itself of this breach for the complete cancellation of the lease, no further step or action on its part would have been called for. The lease in terms provides that if the lessee shall fail to perform and observe any or either of the covenants in said lease contained, the lessor may immediately, *whilst such neglect or default continues, and without further notice or demand,* enter and repossess said premises. Thus the breach of a covenant was complete and unless there had been some act by the lessor showing a waiver of the right to terminate, the "neglect or default continues" and has continued from that time forward.

In the enforced abandonment of the premises by the insolvent bank when the Comptroller of the Currency took possession, the same breach was but carried on and here again the right of the landlord to re-enter, *without notice*, is reserved in the lease. The terms of the contract were at that time already broken and though this subsequent breach may have been more positive in its nature, its effect was but cumulative. The default dated from May 1st, it grew beyond recall when the abandonment occurred. The lessor's right of action was ripe and ready to be enforced after May 1st, and could have been begun

then or at any time within the period of statutory limitation. *There had been a direct breach of contract and impossibility of performance on the part of the lessee.* Nothing additional was necessary to perfect the cause of action or the legality of the claim as it stood at the time the insolvency occurred, the damage had then been done, the pecuniary amount only of such damage remained to be ascertained and the measure of this damage is the rent reserved under the lease, with such deductions as should be made for re-letting. This is in accordance with the express provision contained in the lease. To be sure, the receiver who took possession not long afterwards paid rent for the time the premises were occupied by himself and by the bank examiner, both representatives of the Comptroller of Currency, and this amount so paid should apply on and be deducted from the amount due from the bank, just as rent collected after a re-letting of the premises should so apply; the receiver did not pay this rent as the representative or agent of the bank; he is the representative of the Comptroller and the statutory assignee. He paid for the use of the premises, as any stranger to the lease would have done, for the time during which he and the bank examiner were in possession. While the breach of contract, therefore, occurred on the 1st day of May, 1893, the exact amount of damages which the lessee ought in consequence to pay was not fairly ascertainable until the deductions to which it was entitled had been fixed, and the only deduction for the first year covered by this suit was the amount paid by the receiver.

Counsel for plaintiff in error still insists upon thinking that the receiver is the representative solely of the bank, and, therefore necessarily hostile to this claimant. He still repeats, as he said in the court below, that no claim

arose against the bank until August 1st, and challenges the correctness of the statement by defendant in error to the contrary. The matter is important to this court only for the purpose of fixing the dates. It is not and cannot be disputed that the first installment of rent was, according to the covenant of the lease, due and payable on May 1st, 1893. It is equally true and undisputed that the bank took possession of the premises on or about that day. Why the bank did not at once and promptly pay its rent is very clear. The institution was then on the verge of bankruptcy and doubtless fully realized its tottering condition while moving into its elaborate new quarters. What more natural excuse for such a concern to make than that the premises were not in condition to suit its tastes! It is a fact well known to all, that the renting season in Chicago is on or before May 1st of each year, and that premises left vacant after that date find new tenants with great difficulty, if at all, before the following May. Knowing this fact, the bank, nevertheless, moved in and took possession, in order doubtless to have elegant offices in which to go into bankruptcy. As a result, the lessor had the entire second floor of its new building left tenantless and unproductive. Granting that a claim for those nine days during which the bank enjoyed its new home has not been included in the claim made, that is entirely a secondary consideration. The lessor was compelled to accept the amount received, or nothing at all. The only question of importance is, did the association break its covenant before or after insolvency declared, and did this cause of action and claim ripen and become absolute on May 1st, and before May 9, 1893, or not? The particular covenants of the lease in answer have already been quoted, and the entire lease forms a part of the record in this case (Transcript, pages 10-16). The stipulation in regard to the facts, also a part of the record, recites that the lease was entered into on November 18th, 1892 (Transcript, page 10); that the Chemical National Bank took possession of the premises on or about May 1st, 1893, and continued to retain possession until the 9th of May, 1893 (Transcript, page 18). At that time the bank confessedly became unable to fulfill its part of the contract. It ceased to be an active factor, and under the conditions of its existence *no power could revive it* for again carrying on business. The receiver, as representative and trustee, first for the United States Government, and next for the insolvent and its creditors, then stepped in, occupied the premises until August 1st, and paid rent for that period, which the landlord accepted, as it had a right to do, *without prejudice to its claim against the bank and its stockholders*, acting in pursuance of the course previously agreed upon between the parties and stated in the lease.

III.

THERE IS NO LANGUAGE IN THE NATIONAL-BANK ACT WHICH DIRECTLY OR BY IMPLICATION, CAN RELIEVE AN INSOLVENT NATIONAL BANK FROM ITS OBLIGATIONS INCURRED UNDER AN UNEXPIRED LEASE ENTERED INTO BEFORE INSOLVENCY.

By Section 1 of the Act of Congress of June 30, 1876, relative to the appointment of receivers of National banks, Chapter 156 of the Supplement to the Revised Statutes of the United States, the conditions which, among others, make it proper that a receiver shall be appointed, are named. The section referred to reads as follows:

"Be it enacted, etc., that whenever any national "banking association shall be dissolved, and its rights, "privileges and franchises declared forfeited, as pre-"scribed in section fifty-two hundred and thirty-nine of "the Revised Statutes of the United States, or when-"ever any creditor of any national banking association "shall have obtained a judgment against it in any court "of record, and made application, accompanied by a "certificate from the clerk of the court stating that such "judgment has been rendered, and has remained unpaid "for the space of thirty days, or whenever the Comp-"troller *shall become satisfied of the insolvency of a* "*national banking association*, he may after due exam-"ination of its affairs, in either case appoint a receiver, "who shall proceed to close up such association and *en-"force the personal liability of the shareholders*, as pro-"vided in section fifty-two hundred and thirty-four of "said statutes."

The Comptroller of the Currency became satisfied of the insolvency of the Chemical National Bank of Chicago. He thereupon appointed a receiver who proceeded to close up the association. Section 5234 of the statutes referred to in the foregoing section provides in part, that the receiver "may, if necessary to pay the debts of such "association, enforce the individual liability of the stock-"holders." The liability of shareholders in national banks, and the extent of this liability is fixed by Section 5151 of the statutes, as follows: "The shareholders of "every national banking association shall be held indi-"vidually responsible, equally and ratably, and not one "for another, for *all contracts, debts and engagements* "of such association to the extent of the amount of "their stock therein at the par value thereof."

These sections of the National-bank Act, together with those heretofore quoted or referred to, are, we believe, the only passages which tend to throw light upon the intent of Congress in respect to the obligations of an insolvent national banking association and the security provided for its creditors. Unless there are others which we have failed to find, there is no language used which would show a purpose to limit the liability within a narrower compass than that applied to insolvents generally. The primary purpose of the creation of national banks is to provide a system of depositaries, agents and circulating mediums which shall secure *absolute safety to the Federal Government.* To insure this purpose the association, before commencing business, is required to deposit securities with the treasurer of the United States, and in addition the government is given a first lien on all the assets of the bank. This security accomplished, the next purpose is to provide *safety for every person who has dealings or does business with the bank.* This end is secured by imposing a double liability upon every shareholder of the bank and by providing that these shareholders shall be held responsible for all contracts, debts and engagements of the association. It would indeed be highly inconsistent with the dignity of the United States Government to create and foster institutions incapable and without adequate provision, in case of their failure in business, of meeting their obligations justly incurred in the ordinary course of honorable business. It cannot have been the intent of Congress to create banking institutions of which it could be said that he who deals with them does so at his peril, or that they are shields behind which those who are to share in their *profits* in time of prosperity may dodge and *escape liability* in case of

"Be it enacted, etc., that whenever any national "banking association shall be dissolved, and its rights, "privileges and franchises declared forfeited, as pre- "scribed in section fifty-two hundred and thirty-nine of "the Revised Statutes of the United States, or when- "ever any creditor of any national banking association "shall have obtained a judgment against it in any court "of record, and made application, accompanied by a "certificate from the clerk of the court stating that such "judgment has been rendered, and has remained unpaid "for the space of thirty days, or whenever the Comp- "troller *shall become satisfied of the insolvency of a* "*national banking association*, he may after due exam- "ination of its affairs, in either case appoint a receiver, "who shall proceed to close up such association and *en-* "*force the personal liability of the shareholders*, as pro- "vided in section fifty-two hundred and thirty-four of "said statutes."

The Comptroller of the Currency became satisfied of the insolvency of the Chemical National Bank of Chicago. He thereupon appointed a receiver who proceeded to close up the association. Section 5234 of the statutes referred to in the foregoing section provides in part, that the receiver "may, if necessary to pay the debts of such "association, enforce the individual liability of the stock- "holders." The liability of shareholders in national banks, and the extent of this liability is fixed by Section 5151 of the statutes, as follows: "The shareholders of "every national banking association shall be held indi- "vidually responsible, equally and ratably, and not one "for another, for *all contracts, debts and engagements* "of such association to the extent of the amount of "their stock therein at the par value thereof."

These sections of the National-bank Act, together with those heretofore quoted or referred to, are, we believe, the only passages which tend to throw light upon the intent of Congress in respect to the obligations of an insolvent national banking association and the security provided for its creditors. Unless there are others which we have failed to find, there is no language used which would show a purpose to limit the liability within a narrower compass than that applied to insolvents generally. The primary purpose of the creation of national banks is to provide a system of depositaries, agents and circulating mediums which shall secure *absolute safety to the Federal Government.* To insure this purpose the association, before commencing business, is required to deposit securities with the treasurer of the United States, and in addition the government is given a first lien on all the assets of the bank. This security accomplished, the next purpose is to provide *safety for every person who has dealings or does business with the bank.* This end is secured by imposing a double liability upon every shareholder of the bank and by providing that these shareholders shall be held responsible for all contracts, debts and engagements of the association. It would indeed be highly inconsistent with the dignity of the United States Government to create and foster institutions incapable and without adequate provision, in case of their failure in business, of meeting their obligations justly incurred in the ordinary course of honorable business. It cannot have been the intent of Congress to create banking institutions of which it could be said that he who deals with them does so at his peril, or that they are shields behind which those who are to share in their *profits* in time of prosperity may dodge and *escape liability* in case of failure. To this end Congress was not satisfied with the single stockholders' liability, such as attaches to the owners of stock in corporations existing under the laws of many states, but it has imposed this double liability in order that, in case of bankruptcy, there may be an adequate fund out of which to pay all its debts, contracts and obligations.

Moreover, the sort of debts which are to be paid is not left uncertain; obligations to pay rent are not excepted; the language used in section 5,151 is "*for all contracts,* " *debts and engagements.*" What broader or more comprehensive terms could possibly have been chosen to express the intent. It is not *some*, but *all*, and if the very general expressions "contracts" or "debts" are not broad enough, then surely "engagements" covers whatever the others may omit. This liability has, of course, its limitations as to the *time within which the contract, debt or engagement may be entered into.* It has none as to their *kind* or *quality*. After the banking association has failed and become insolvent, then its further power to *enter into new* contracts or to do business, and the power of the directors to subject the stockholders to new liabilities, is ended, but every obligation entered into up to that time with a person acting in good faith and relying for the fulfillment of his contract on the credit and responsibility of a national bank, a representative to some extent of the Federal Government, *must be met*, so far as all the assets and double the par value of all the stock held by its shareholders are able to meet them.

This question is not one which is entirely without judicial interpretation. While no case has been found which enters fully into the matter now under consideration, that the intent of the statute has by this court received the interpretation which we have urged, is shown clearly by the language of Chief-Justice Waite in the case of *White* v. *Knox*, 111 U. S., 787.

The facts of the case were that White had a claim against the insolvent national bank which the Comptroller refused to allow, and which White was obliged to have adjudicated by a court. Judgment was given in White's favor, not for the full amount of his claim alone, but for that *with interest added to the date of judgment*, while no such interest had been allowed on any other claim.

This court said:

"The business of the bank must stop when insolvency
" is declared (Sec. 5,228). No *new* debt can be made
" after that. The only claims that a comptroller can
" recognize in the settlement of the affairs of the bank
" are those which are shown by proof satisfactory to
" him, or by the adjudication of a competent court, *to*
" *have had their origin in something done before the in-*
" *solvency.*"

Does this language not expressly recognize the fact that a contract once entered into is binding, whether the time for its complete fulfillment shall have arrived before insolvency or not? He does not say that the entire obligation must have become due and payable before the insolvency, but that the claim must have had its *origin*—nothing more—in something done before the insolvency. Whether, therefore, by the breach of contract in failing to pay rent the entire obligation became due or not, the opinion above would recognize it as a valid claim, as having had its origin in something done, and, more, as having become as binding an obligation as written words can make, before the insolvency.

Again in the case *Richmond* v. *Irons*, 121 U. S., 59-62. The Manufacturers' National Bank became insolvent. After a receiver had been appointed, Holmes, the president of the bank, endeavored to give an advantage and preference to certain creditors by turning over to them commercial paper which formed a part of the assets of the bank, endorsed by Holmes, and guaranteed by the bank. This court (p. 60) says: "Those creditors who "made settlements after the bank was put into liquida-"tion and received from the president in that settlement "paper of the bank, or as in some cases, the individual "notes of Holmes himself, endorsed or guaranteed in the "name of the bank, are not to be considered as credit-"ors of the bank entitled to subject the stockholders to "individual liability. The individual liability of the "stockholders, as imposed by and expressed in the stat-"ute, is indeed for all contracts, debts and engagements "of such association, but that must be restricted in its "meaning to such contracts, debts and engagements as "have been duly contracted in the ordinary course of its "business. That business closed when the bank went "into liquidation. After that there was no authority on "the part of the officers of the bank to transact any busi-"ness in the name of the bank so as to bind its share-"holders, except that which is implied in the duty of "liquidation, unless such authority had been expressly "conferred by the shareholders." Here was a case where there had been an attempt on the part of the president, in collusion with a few creditors, to in effect perpetrate a fraud upon all other creditors, securing their own claims at once and in full, while the others were left to await the slow action of receivership and percentage distribution. The acts complained of were all done after insolvency was declared, and this court very justly held that those claims were barred, and that the stockholders could not in this manner be subjected to their double liability. The debts so made were not debts of the bank; they were the individual action of the president, and without authority.

We insist that suit for damages might have been brought at once after May 1, 1893, and this without further notice to the lessee, since the lease so provides, and that the measure of such damages would have been the rent reserved by the lease for the entire term; from a judgment for damages so obtained the bank should, by the terms of the lease, be entitled to deductions on account of re-letting the premises on such terms as the lessor might deem expedient. Accordingly in giving judgment the Appellate and Supreme courts of Illinois deducted the amount paid by the receiver. The written lease is the only source of obligation. It is the only ground upon which to base any claim. Its terms are explicit; nothing is left for implication by law. It was an obligation entered into by the directors, acting for the stockholders, in the ordinary course of the bank's business. By its terms nothing new is left to be done after the bank's failure. It was duly executed six months before, and violated by the lessee eight days before its insolvency. It is as clear an example of a "contract" or "engagement" as the law can furnish, and it had its origin in something done by the Chemical Bank long before its insolvency.

If a national bank, acting within its proper corporate functions, and it would be so acting, should issue a bill of exchange, dated before, but *payable after its insolvency*, could this be held to be a *new debt* and would the legal holder of the note not be entitled to judgment against the bank in case the bill should not be paid *when due?* Or to use an illustration still more apt, if a principal note, payable in five years, had been given, with interest payable semi-annually, evidenced by interest coupons, and it were agreed that on failure to pay any instalment of interest when due, the whole debt should at once become due and payable, would this obligation be released by insolvency after the first interest note was eight days overdue? It is then not clear how by any, even the most liberal, construction of the statute, this insolvent can be held to be absolved from liability under the law. In the case of *Richmond* v. *Irons*, above cited, this court further says: "section 5151 imposes upon the "shareholders of every national banking association an "individual responsibility for all its contracts, debts and "engagements, and *the terms in which the obligation "is created are unconditional and unqualified*, except "that the liability shall be equal and ratable as among "the stockholders;" and further, in the same opinion: "In the case of involuntary liquidation under the super- "vision of the Comptroller of the Currency, the receiver "appointed by him is *authorized and required*, not only "to collect and apply the proper assets of the bank to "the payment of its debts, but also, so far as may be "necessary, *to enforce the individual liability of the "shareholders*. It thus appears that the enforcement of "this liability is a part of the liquidation of the affairs "of the bank."

We believe the receiver in this case has so far taken no steps to enforce the shareholder's liability. If such is the fact, it can scarcely be complained that were this claim established, there would be no fund out of which to pay it. So far as necessary the receiver is not only *authorized*, but *required*, to take this step; it is a part of the liquidation of the affairs of the bank and the power is by statute given exclusively to the receiver; creditors are compelled to reach the stockholders, if at all, through him. While our purpose must be confined to establishing the *right*, and cannot extend to fixing the fund, it is our object to show that the former should not fail for any want of the latter.

The report is that the assets of this plaintiff in error, the Chemical National Bank, will prove sufficient to pay all claims in full and that something even may be left to be returned to the stockholders after the receiver and Comptroller are discharged. Would it be just in such an event that this defendant in error should have been a heavy loser on account of its dealings with this National bank, while the stockholders, whose lease it actually was, receive a dividend? It is impossible that Congress contemplated such a result!

The rule is that statutes in derogation of the common law shall be strictly construed; nothing is to be implied which is not expressed. In *Gardner* v. *Collins*, 2 Peters, 93, Mr. Justice STORY, speaking for this court, said: "What the legislative intent was can be derived only "from the *words they used*, and we cannot speculate "beyond the reasonable import of those words; the "spirit of the act must be gathered from the words of "the act and not from conjecture *aliunde*." The statute says that the shareholders of every national banking association shall be held responsible for all contracts, debts and engagements, "*ita lex scripta est.*" This is plain, simple language, and as so understood *all* does not mean *a certain part only*. Interpretation of these words would be unwarranted; it would amount to an assumption of legislative power, except for the purpose of limiting them to actual debts incurred and business transactions entered into by authority of the shareholders.

In the class of cases relied on by plaintiff in error, claims were not allowed because, in each case, their existence at all depended upon some contingency which might never happen, and which could not be removed by calculation. Such as the uncertainty whether a wife would outlive her husband, and come into her dower. Even were the same rule applicable in passing upon claims under the National-bank Act, it would not affect the present claim. There is no contingency here, nor was there any at the time of insolvency. The cause of action against the bank was before that time absolutely fixed, and, as already argued, suit might have been brought at any time after May 1st. The amount of damages would have been easily ascertainable, and was capable of exact measurement, and "*id certum est quod certum reddi potest.*" No contingency existed which might, by happening or not happening, annul the contract liability, or destroy the cause of action. The express covenant of the lease puts it within the power of the lessor, in case of breach by the lessee, to re-let the premises, and to charge the lessee with the loss and difference, if any, in case the premises are let at a lower rental. The effect of the operation of this covenant is that immediately upon breach the claim of the lessor against the lessee takes the shape of *fully matured but unliquidated damages.* Under such a clause can there be a doubt as to the immediate existence of a right to sue? The covenant between the parties establishes that;

nothing could do so more completely. That this would be the force and effect of such an express covenant, where one existed, was the opinion of Judge LOWELL, in *Ex parte Houghton*, 1 Lowell, 554. In that case the lessor had, by his own act, terminated the lease, and he was held not entitled to recover. The court, however, remarks: "It is not uncommon now for leases to con-"tain the provision that, in case of breach, the lessor "may enter and re-let the estate at the expense and risk "of the lessee, and charge him with the deficiency. "Under such a clause a lessor might well have the right "to prove for the full amount of the damages which "should be ascertained by such re-letting."

Almost without exception such decided cases as seem to maintain a doctrine contrary to the one here contended for, have had reference to some particular bankruptcy statute of this country or England. In considering such cases it, therefore, becomes necessary to consider the particular statute under which those cases arose, and the object for which such bankruptcy laws have been enacted. They have always been considered extreme measures, passed in times of great public necessity and commercial crises, for the relief of the debtor class. Their purpose has been a humane one; that debtors when hopelessly involved should have an opportunity to wipe out old scores and begin anew. Under all such laws, the policy has nevertheless been to give the creditor an opportunity to make good his claim, and if the statute did not permit it to be proven against the bankrupt's assets, the claim was not cut off by the discharge in bankruptcy, but could afterwards be enforced against the individual. The cases *Riggin* v. *Magwire*, 15 Wall., 549; *French* v. *Morse*, 2 Gray, 111, and *Savory* v. *Stocking*, 4 Cush., 607, all arose under the United States Bankruptcy Act of 1841. The more recent bankruptcy law of 1867 was repealed in 1878, and none has since been enacted in its place. The "National-bank Act" is in no sense a bankruptcy law; it provides only for the bank's insolvency and should be controlled by the same rules which govern in case of a *living insolvent* or a *dissolution of co-partnership.*

Here the insolvent is still in existence while in process of being wound up. Sentence has been pronounced, but execution has not taken place. It is a *living* insolvent. Moreover, here are special covenants in this lease, deliberately entered into by the parties and intended to fix their respective rights *in any event;* these covenants can not be lightly disregarded nor declared to be inoperative. It is clearly provided in the Bank Act, what steps shall be taken to wind up the association, but no limit whatsoever is placed upon the sort of debts, except that all must be paid. It is therefore submitted that any debt which might be enforced against an insolvent under the general law of insolvency ought likewise to be enforced against an insolvent national bank, and that the adjudication by the Appellate court and the Supreme court of Illinois, allowing the claim of defendant in error in the amount of $9,000 was both just and in conformity with the intention of the United States National-bank Act.

CHARLES H. BALDWIN,

For Defendant in Error.

Office Supreme Court U. S.
FILED.
JAN 2 1896
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 735.

CHEMICAL NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
HARTFORD DEPOSIT COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR IN REPLY.

HIRAM T. GILBERT,
FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINTERS.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1895.

No. 735.

CHEMICAL NATIONAL BANK OF CHICAGO,
Plaintiff in Error,
vs.
HARTFORD DEPOSIT COMPANY,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR IN REPLY.

MAY IT PLEASE THE COURT:

We do not deem it necessary to notice all the points attempted to be made by counsel for defendant in error, but shall content ourselves with briefly discussing a few of the more important of them.

I.

It is said that Section 5,151 of the Revised Statutes makes shareholders "individually responsible, equally "and ratably, and not one for another, for all *contracts,* "*debts and engagements* of such association to the ex-

"tent of the amount of their stock therein at the par "value thereof," and that this is inconsistent with the position taken on behalf of plaintiff in error that a claim, in order to be proven up and paid by dividends out of the assets, must be one which, at the date of the bank's suspension, is a then existing demand.

Even if otherwise the language thus used in Section 5,151 might have the force contended for, it cannot be so construed in view of the language of Section 5,234 that the receiver "may, if necessary to pay the *debts* of the as- "sociation, enforce the individual liability of the stock- "holders." Construing Sections 5,151 and 5,234 together, we observe the manifest intention of Congress to be that the liability of the shareholders to be enforced by the receiver should be for such contracts and engagements of the association as should, at the date of the bank's suspension, have ripened into debts.

In this connection a further illustration may be given of the difficulties that would be attendant upon the allowance of claims of the character here in question to be paid by dividends out of the assets.

Let us suppose that on the 1st day of January, 1893, the Chemical National Bank had entered into a contract with a lawyer, by the terms of which he was to perform the duties of its legal adviser for the term of ten years from that date, at an annual salary of $6,000, payable in monthly installments of $500 each on the first day of each month, and that this were a suit brought by him to recover the monthly installments accruing subsequently to the bank's suspension, he showing he had, during the time already elapsed, been ready, willing and able to perform the stipulated services, and expressing a readiness and willingness to perform them in future. Would it be seriously contended he could not only recover in this suit for the installments already become due, but could also maintain suits in the future for installments subsequently falling due, and this, too, notwithstanding it had become impossible for the bank to continue him in its employment or for him to perform the stipulated services?

In such case it seems to us it would necessarily be held that the contract, so far as it still remained executory, was terminated by the suspension of the bank resulting in the appointment of the receiver, and that no recovery could be had for salary thereafter accruing, and for which no services were or could be rendered. In other words, it would be held in that, as in all other cases, that the provisions of the law regulating national banks, their power, liabilities and their closing up in case of insolvency, were as much a part of the contract as if they had been incorporated therein in express terms, and that a contract for services to the bank to extend over a period of ten years, would be construed and given such effect, and no other as it would have were there embodied in it, in express terms, a provision that the employment should continue for a period of ten years unless sooner terminated by the suspension of the bank and its closing up through a receiver appointed as provided by law.

On the other hand, suppose that before the expiration of the ten years the lawyer should die, or should become insane, and thus wholly incapacitated for performing the duties of his employment, would it in such case be insisted that his estate would be liable for damages because of his death or insanity, and consequent inability to carry out his contract? Manifestly not. On the contrary it would be held that the contract, so far as it was executory, was terminated and that there was no liability for damages.

Why should not the same rule be applied to a lease? Wherein does it differ in principle from a contract such as that supposed?

Again, in the absence of any covenant on the subject contained in a lease, it is terminated by the destruction of the leased premises, and the consequent inability of the lessor to furnish to the lessee that for the use of which the latter agreed to pay rent. In such case no matter how great may be the lessee's loss, the lessor is not liable to him for damages. If this is not injustice to the lessee, why it is unjust to the lessor to hold the lease terminated by the extinction of the business capacity of the lessee corporation and its consequent inability to transact business or to make any use of the demised premises?

It is apparent that the argument that to hold that only such claims can be proved as have, at the date of the bank's suspension, ripened into debts, will produce injustice has no more force in this case than the same kind of argument would have with respect to the application of many other rules of law.

II.

After stating at the opening of their brief and argument that "the facts in the case at bar are, in the main, "correctly stated by counsel for plaintiff in error in the "introduction of his brief," counsel for defendant in error nevertheless asserts that a breach of the lease on the part of plaintiff in error occurred May 1, 1895, and insists, in effect, that thereby this cause of action and claim ripened and became absolute on May 1, 1893.

We have already shown in our opening brief and argument (pages 37–39), that the stipulation shows that defendant in error was fully paid all rent due to it down to and including July 31, 1893. By accepting payment in full of the rent, it necessarily waived any prior breach of the lease on the part of the lessee if there was one. But even were this otherwise, the breach being solely as to the installment of rent falling due May 1, 1893, the only cause of action which defendant in error then had was one for the rent then due. It is a manifest absurdity to suppose that it then acquired a cause of action for the rent stipulated for the entire term. Such a cause of action could only arise out of a provision that upon default in the payment of a single installment of rent the lessor might declare all future installments immediately due and payable.

III.

It is said that "it would be highly inconsistent with "the dignity of the United States Government to create "and foster institutions incapable and without adequate "provision, in case of their failure in business, of meeting their obligations justly incurred in the ordinary "course of honorable business." (Brief and argument for defendant in error, page 29.)

To this it is a sufficient answer to say that it is not the business of the government to act as the guardian of every lessor or other person who may wish to have dealings with a national bank. Any person having such dealings is bound to take notice of the law, and if he does not see fit, by his contract, to protect himself against the danger of the insolvency of the bank, no reason is perceived why he should be protected by the government. As we have already shown, this lessor provided for the contingency of the bank's insolvency by the covenant that it might, in such case, terminate the lease, and with this protection it should be required to be content.

HIRAM T. GILBERT,
For Plaintiff in Error.